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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 675.

HENRY E. BECKER, *Petitioner,*

v.

ROBERT C. SOLOMON, Trustee, Etc., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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CITATIONS.

CASES:

Maggio v. Zeitz, 333 U. S. 56 (1948) 4, 5, 6

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Henry E. Becker, the petitioner herein, prays that a writ of certiorari issue to review the final judgment and order of the United States Court of Appeals for the Seventh Circuit, entered as to this petitioner on January 19, 1950, pursuant to a citation for contempt and order of commitment entered in the United States District Court for the Southern District of Illinois, Southern Division, on March 28, 1949.

Opinions Below.

The order of commitment of the District Court is unreported, but appears in the Transcript of Record on Appeal to the Court of Appeals (R. 68-70), which has been made part of the record in this proceeding.

The opinion of the Court of Appeals has been officially reported at 178 F. (2) 819.

The title of the case below was: *In the Matter of Standard Coal Mining & Converters Corporation,* Bankrupt, *Ralph M. Brock and Henry E. Becker,* Appellants, v. *Robert C. Solomon,* Trustee, etc., Appellee.

Jurisdiction.

The opinion and Order of the Court of Appeals affirming the Order of the District Court was entered on November 16, 1949. (R. 84-88) A petition for rehearing was filed with said Court of Appeals on January 5, 1950 (R. 91-94), and was denied by said court on January 19, 1950. (R. 94)

On February 14, 1950, and by order of Associate Justice Sherman Minton, of this Honorable Court, the time within which the petitioner herein might file this petition for a writ of certiorari was extended to March 18, 1950. (R. 98)

The jurisdiction of this Honorable Court is invoked under Section 23(c) of the Bankruptcy Act, as amended by the Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 854, 11 USCA Sec. 47(a); and Section 1254 of the Judiciary Procedure Act of June 25, 1948, c. 646, 62 Stat. 928, 28 USCA, Section 1254(1), effective September 1, 1948.

Questions Presented.

1. Is not the punishment imposed upon this Petitioner by the District Court and approved by the Court of Appeals repugnant to the Fifth Amendment of the Constitution of the United States which forbids deprivation of life, liberty

and property without due process of law, and to the Eighth Amendment of the Constitution which forbids cruel and unusual punishment?

2. Did the trial court err in failing and refusing to conduct a fair and impartial trial on the issue of the Petitioner's then present ability to comply with and obey the turnover order?

3. May a contempt order for failure to comply with a turnover order be substituted for a criminal prosecution so as to deprive a man of his constitutional and otherwise legal right not to be incarcerated for a debt which he begs for leave then to prove he is unable to pay?

Statement.

1. On June 25, 1947, the Standard Coal Mining & Converters Corporation, of which your petitioner was Vice-President, was adjudicated a bankrupt by the United States District Court for the Southern District of Illinois, Southern Division. (R. 6)

2. Thereafter, on the 31st day of August, 1948, an order was entered in the said District Court, by the Honorable Basil H. Coutrakon, Referee in Bankruptcy, finding that the Petitioner herein had in his possession the sum of $19,500 (R. 18, 23, para. 16), and ordering him to turn over that sum within 10 days of the date of service of the order. (R. 24, para. 2) A copy of the order was served on the Petitioner herein on December 20, 1948. (R. 25)

3. On March 8, 1949, there was filed in said District Court a "Referee's Certificate For Contempt For Failure To Surrender Assets", wherein the Referee certified the Petitioner herein to be in contempt of court. (R. 28)

4. On the 28th of March, 1949, proceedings were had in the said District Court, before one of the judges of said court, wherein testimony was taken on the Referee's Certificate of Contempt. (R. 30-67)

5. Counsel for Petitioner herein offered at that time to prove this Petitioner's inability to conform to the order, either at the time of the issuance of the order or at the time it was served on him. Such offer was the testimony of the Petitioner herein as to the disposition made of the money and the fact that he did not at the time of the issuance of the order or at the time of the hearing have possession of or any control over it. On objection by Counsel for the Trustee (R. 36, Pefferle), Counsel for the Petitioner herein was denied the right to introduce such testimony. (R. 41, The Court; 65, Seyfrit; 66, The Court)

6. On the theory that the turnover order was *res adjudicata,* both as to the fact of Petitioner herein having had possession of the said money at the time of the adjudication of bankruptcy and a continuing possession of it up to and through the date of the issuance of the turnover order, the Petitioner herein was adjudged guilty of contempt and committed to jail until such time as he purged himself of the contempt "by paying to Robert C. Solomon, Trustee in Bankruptcy of this Estate, or to the Marshal for his use, the sum of $19,500, and unless he shall sooner be discharged by due process of law." (R. 70)

7. Subsequently, on April 26, 1949, an order was entered in the Court of Appeals reducing the bond to the amount of $10,000, and, on approval of said bail bond, the Petitioner herein was released from custody on May 7, 1949, pending final disposition of this proceeding.

8. The Court of Appeals for the Seventh Circuit, in its opinion on appeal observes the error on the part of the trial court in not permitting the introduction of evidence upon the basis of which the Petitioner herein might have purged himself of the contempt, in accordance with the principles laid down by this Honorable Court in *Maggio* v. *Zeitz* (333 U. S. 56), in the following language:

"We are all admonished by the Supreme Court in the Maggio case, supra, that the enforcement of turnover orders can be resolved only by the good judgment of the trial court, mindful that the order should issue only as a responsible and final adjudication of possession and ability to deliver, not as a questionable experiment in coercion which would bring discredit to the judicial process.

"At the hearing herein, the trial court seemed reluctant to admit testimony as to what * * * Becker did with the funds withdrawn from bank accounts of bankrupt, apparently on the theory that the turnover order was res adjudicata and could not be collaterally attacked. We agree that such order was res adjudicata, but we are of the view that such testimony was relevant and material." (R. 87-88)

9. Notwithstanding this observance of prejudicial error on the part of the trial court, the Court of Appeals AFFIRMED the lower court. (R. 88-89) A motion for Rehearing and Clarification of the opinion was subsequently denied on January 19, 1950. (R. 94)

Specification of Error.

The court below erred:

In failing and refusing to enter an order quashing the Order of the District Court and remanding the case to that court with directions for further proceedings, in accordance with its observation of a denial of due process by the trial court, in failing and refusing to permit Becker to introduce such proof as he might have in support of his contention that the funds covered by the turnover order were no longer in his possession or under his control.

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals is in direct conflict with the decision of this Honorable Court in *Maggio* v. *Zeitz,* 333 U. S. 56. (1948)

2. So long as the decision of the Circuit Court and order of affirmance of the order of the District Court is allowed to stand the Petitioner will be worse off than if he had been criminally prosecuted, in that if indicted for a crime he could not and, presumably, would not have been denied due process as to the right to prove his innocence, whereas now, and in view of the action of the Circuit Court in affirming the action of the trial court in denying him the right to purge himself of the contempt citation, he might never, as a matter of right, be permitted to do so.

3. Unlike the situation as it existed at the time the *Maggio* case was before the Court of Appeals for the Second Circuit, under the title *In Re Luma Camera Service, Inc.* (157 F. 2d 951), the court below was not precluded by precedent from acknowledging the fact that Becker, the Petitioner herein, was being punished for a crime under a fictitious presumption of continuing possession. It had the opinion of this Honorable Court as a guide. By a refusal to follow it the court below brings discredit to the judicial process.

4. In the *Maggio* case, *supra,* the Court of Appeals for the Second Circuit invited (p. 955) and received the aid of this Honorable Court in eliminating the unfortunate results of adhering to that fictitious presumption, while the Circuit Court for the Seventh Circuit seems fixed in its determination to continue to follow the repudiated precedents that deny to this Petitioner the due process spelled out by this Honorable Court in the *Maggio* opinion.

5. There can be no guarantee of due process to this Petitioner other than by the granting of this petition and entry of an Order vacating the judgments below and remanding the case to the District Court for proceedings consistent with the principles laid down by this Honorable Court in the *Maggio* opinion. Without such protective relief by affirmative action of this Honorable Court the Petitioner faces recommitment and an indefinite stay in jail. His release will hinge solely on his ability to establish inability

to conform to the order through a door that was closed to him by the District Court and locked by the Court of Appeals.

Conclusion.

It is respectfully submitted that, for the foregoing reasons, this petition for a writ of certiorari should be granted; the order entered by the court below on November 16, 1949, should be reversed, without oral argument; and the case remanded to the District Court with directions to quash the order of commitment of March 28, 1949; and that your Petitioner have such other and further relief as to this Honorable Court may seem fitting and just in the premises.

JAMES A. COSGROVE,
Attorney for Petitioner.